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## Reasons for Decision

Association des employés EBM,

*applicant,*

*and*

Autobus Idéal Inc.,

*employer,*

*and*

Syndicat des travailleuses et travailleurs des  
Autobus Idéal - CSN,

*intervenor.*

Board File: 29189-C

Neutral Citation: 2012 CIRB 642

June 11, 2012

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The Canada Industrial Relations Board (the Board) was composed of Mr. Claude Roy, Vice-Chairperson, and Messrs. Daniel Charbonneau and Robert Monette, Members.

### **Counsel of Record**

Mr. Philippe Garceau, for the Association des employés EBM;

Ms. Neda Esmailzadeh, for Autobus Idéal Inc.;

Mr. Daniel Charest, for the Syndicat des travailleuses et travailleurs des Autobus Idéal – CSN.

The majority reasons for decision were written by Mr. Claude Roy, Vice-Chairperson. The dissenting opinion was written by Mr. Robert Monette, Member.

[1] The Board considered the application for certification filed by the Association des employés EBM (the applicant or the union). On February 10, 2012, the Board decided to hold an oral hearing on March 27, 28 and 29, 2012. During a pre-hearing conference call on March 12, 2012, the parties asked the Board for permission to file written submissions in lieu of the hearing, given that they had reached an agreement on the documents to be filed with the Board. It was accordingly decided that the applicant would file its submissions by March 28, 2012, and that Autobus Idéal Inc. (the employer) and the Syndicat des travailleuses et travailleurs des Autobus Idéal - CSN (Idéal - CSN or the intervenor) would file theirs by April 5, 2012. The Board is satisfied that the documents on file and the parties' written submissions are sufficient for it to decide the matter without an oral hearing, pursuant to section 16.1 of the *Canada Labour Code (Part I-Industrial Relations)* (the *Code*). On May 9, 2012, the Board issued certification order no. 10263-U and informed the parties that the detailed reasons for decision by the majority and the dissenting member in regard to the employer's federally regulated operations would follow shortly. The reasons are set out below.

### **I-Nature of the Application**

[2] On December 23, 2011, the applicant filed an application for certification as a bargaining agent pursuant to section 24(1) of the *Code*. On January 10, 2012, the applicant advised the Board that its application was actually pursuant to section 24.1 of the *Code*, given the existence of a collective agreement signed with the employer for the period from August 1, 2007, through December 31, 2012.

[3] On January 10, 2012, Idéal - CSN applied to the Board for permission to intervene in the matter, stating that it was certified by Quebec's Commission des relations du travail to represent most of the employer's other employees not covered by the subject application for certification and might be affected by a Board ruling as to whether the company was federally or provincially regulated. It indicated that it objected to the applicant's application as an undertaking under federal jurisdiction. On February 10, 2012, the Board granted Idéal - CSN permission to intervene, on the basis that the

latter had demonstrated sufficient interest in the matter and neither the applicant nor the employer objected to its application.

[4] On January 25, 2012, the employer informed the Board that it did not object to the bargaining unit proposed by the applicant and was leaving it to the discretion of the Board to decide on its constitutional jurisdiction over the company. It subsequently expressed support for the applicant's position.

## **II-Background and Facts**

[5] On July 23, 2009, following a partial sale of Transport École-Bec Montréal (EBM) Inc. to Autobus Idéal Inc. on May 15, 2009, Quebec's Commission des relations du travail certified the applicant as the bargaining agent for a unit of employees of Autobus Idéal Inc. comprising the following:

All employees within the meaning of the Labour Code, excluding clerical employees assigned to school bus transportation for Peter Hall School, whose routes were sold by Transport École-Bec Montréal (EBM) Inc.

(translation)

[6] The applicant sought certification as the bargaining agent for a unit of employees identical to that represented by it at the provincial level. On June 11, 2007, it had signed a collective agreement with Transport École-Bec Montréal (EBM) Inc. effective August 1, 2007, and expiring December 31, 2012. Autobus Idéal Inc. is bound by that collective agreement as a result of the partial sale of the business.

[7] The applicant applied to the Board for certification in respect of this unit of employees of Autobus Idéal Inc. on the basis that the employer is primarily engaged in providing school bus transportation and transportation for extracurricular activities as well as for charter trips, some of which are made outside of Quebec, in Ontario, thereby making the employer a federal work, undertaking or business within the meaning of section 2(b) of the *Code*.

[8] The intervenor has been certified since May 11, 2011, by Quebec's Commission des relations du travail to represent a unit of employees of Autobus Idéal Inc. that excludes the employees covered by the certification application now before the Board. The unit is described as follows:

All employees within the meaning of the Labour Code, excluding those already represented by another certified association, as well as clerical staff and garage employees [for its facilities located at 7801 Marco-Polo Avenue, Montréal].

(translation)

[9] On April 17, 2011, the intervenor filed an application for certification to represent the employees in question with both Quebec's Commission des relations du travail and the Board (file no. 28706-C).

[10] On April 21, 2011, in connection with the certification application in file no. 28706-C, the employer indicated to the Board that it was not a federal work, undertaking or business within the meaning of section 2(b) of the *July 23, 2012*. It stated that, to accommodate its customers, it might make between 60 and 90 trips to Ontario every calendar year and had a licence to operate in Ontario, as well as additional liability insurance for that purpose. It also stated that it filed quarterly IFTA [International Fuel Tax Agreement] returns for fuel tax rebates related to trips made to Ontario. In its letter, it informed the Board that it had decided that it would no longer make trips into Ontario and so federal jurisdiction could not apply in such circumstances. It also indicated that, following the purchase of the school bus transportation contracts from Transport École-Bec Montréal (EBM) Inc., employees providing school bus transportation for Peter Hall School were not engaged in the transportation of passengers outside the borders of the province of Quebec.

[11] On May 17, 2011, on the basis of this response by the employer, the intervenor withdrew its certification application with the Board and, on May 30, 2011, the Board closed file no. 28706-C. The intervenor pursued its application for certification with Quebec's Commission des relations du travail, which granted it certification on May 11, 2011.

### **III-Positions of the Parties**

#### **A-The Applicant**

[12] The applicant submits that the Board is not bound by the employer's correspondence sent to it on April 21, 2011, in connection with file no. 28706-C. It alleges that the Board never ruled on the employer's position and that the intervenor withdrew its certification application in the matter. In the instant matter, the Board is ruling on the issue of its jurisdiction over the employer's undertaking for the first time. According to the applicant, the parties' conduct in file no. 28706-C has no legal effect on its application for certification, and such conduct and the submissions made are in no way relevant to a ruling on the constitutional question in the instant matter.

[13] The applicant goes on to say that the employer's evidence clearly shows that there have been new developments since the correspondence of April 21, 2011. It submits that there are two new factors to be considered. The first is that, in the correspondence of April 21, 2011, the employer stated that it would be discontinuing interprovincial transportation operations, yet the evidence shows that the company is still engaged in such operations on a regular and continuous basis. The second is that two government bodies handling occupational health and safety issues have found that the company falls under federal jurisdiction and have required the company to comply accordingly.

[14] With regard to the first factor, the applicant submits that, in order for the employer to qualify as a federal work, undertaking or business, its interprovincial transportation operations must be regular and continuous. It refers to the 24 interprovincial transportation contracts filed by the employer for trips made in 2010 and 2011, at the rate of at least one per month except for the month of June 2011, when no trips were made, and the month of August 2011, when three trips were made. Another trip was made in January 2012. It also refers to the quarterly fuel tax rebate returns, which show the distance driven in Ontario during the said period. According to its calculations, the distance driven between July 1 and September 30, 2010, was 167,486 kilometres and, in the following quarter, nearly 102,000 kilometres. Although the distance driven was less in the other quarters, the applicant submits that this shows that the employer's interprovincial transportation operations are ongoing, regular and continuous.

[15] With respect to the second factor, the applicant refers to two documents filed by the employer, a letter from an inspector with Human Resources and Social Development Canada, Labour Division (now called Human Resources and Skills Development Canada) (HRSDC) dated September 13, 2011, and a letter from the Contributions Centre of Quebec's Commission de la santé et de la sécurité du travail (the CSST) dated September 20, 2011. In the first letter, the inspector informs the employer that, based on information obtained from the employer on July 20, 2011, the undertaking is a federal work, undertaking or business given that it regularly engages in transportation operations outside the province of Quebec and so Part III of the *Code* is applicable. In the second letter, the CSST representative acknowledges receipt on August 31, 2011, of the employer's request for a redetermination of its contributions on the basis that the undertaking's operations for 2010 and 2011 came under federal jurisdiction. The representative concludes that interprovincial or international road transportation comes under federal jurisdiction and so grants the employer a refund of contributions paid for the two years in question, on the basis that the company is no longer subject to *An Act Respecting Occupational Health and Safety*, R.S.Q., c. S-2.1, respecting protective re-assignment, prevention and, where applicable, the financing of a joint industry-based association.

[16] The applicant recognizes that the Board is not bound by such decisions, but states that it must consider them important facts in analyzing the matter, particularly with regard to the issues of the company's indivisibility and sound labour relations management. It submits that the concept of undertaking is "indivisible," given that it is not possible to declare that one part of an undertaking's operations fall under provincial jurisdiction while the rest falls under federal jurisdiction. It is inconceivable that the employer's undertaking would be subject to Part III but not to the other parts of the *Code*.

[17] Finally, the applicant recognizes that interprovincial charter transportation is not the employer's core business, but maintains that this is immaterial and is not a test that the Board needs to take into

account. In the view of the applicant, all that needs to be established is that the interprovincial transportation operations are continuous and regular, even if they are secondary to the employer's core business.

#### **B-The Employer**

[18] The employer reiterates the facts previously set out and describes the new developments behind its change of position regarding federal jurisdiction over its undertaking, that is, the letter from HRSDC of September 13, 2011, and the one from the CSST of September 20, 2011, from which it derives the argument respecting the indivisibility of the employer's operations. It submits that, based on the principle of indivisibility, once an undertaking is classified as federal, it must be considered one indivisible entity, meaning that all of its labour relations are governed by federal labour legislation.

[19] The employer submits that, because of the decisions of the bodies in question, its labour relations fall under different jurisdiction depending on the subject involved, and this complicates the company's human resource management. In the employer's view, there is a link between the activities of each of the bargaining units, that is, the transportation of passengers. The employees work at the same place of business and are governed by the same administrative structure, the buses are repaired at the same garage, and some drivers represented by the applicant occasionally do charter runs, though not necessarily into Ontario.

[20] The employer alleges that only the tests of regularity and continuity, established in the case law, must be considered in determining jurisdiction over an undertaking. As for the position that it took in its letter of April 21, 2011, the employer argues that the Board must not take it into account in view of the new facts alleged, as well as the fact that the letter in question pertained to a different case, in which the Board never ruled on jurisdiction over the undertaking. The employer adds that it never discontinued its charter operations, contrary to what it had indicated in the letter.

[21] The employer entered into evidence billing information relative to 25 charter trips into Ontario in 2010, 2011 and January 2012. It alleges that it regularly and consistently engages in the transportation of passengers into Ontario via charters and that there is ongoing demand in this regard.

[22] The fact that the employer engages in the transportation of passengers in Ontario entitles it to claim a fuel tax rebate, which means that it must complete quarterly returns, copies of which it filed with the Board. The returns show the distance driven in Ontario for given periods, including the following:

- from 01-04-10 to 30-06-10 = 7,521 kilometres
- from 01-07-10 to 30-09-10 = 167,486 kilometres
- from 01-10-10 to 31-12-10 = 101,726 kilometres
- from 01-01-11 to 31-03-11 = 7,755 kilometres

[23] The employer also filed riders to its insurance policy showing the renewal of coverage for out-of-province trips and a premium surcharge for having exceeded the driving distance in Ontario that it had originally indicated for 2010–11.

[24] The employer submits that its business has a licence to operate in Ontario.

[25] It recognizes that, although the employees in the bargaining unit covered by the applicant's certification application do not make trips into Ontario, the unit is an integral part of the company, and it supports the applicant's request that its undertaking be declared a federal work, undertaking or business for all of the reasons set out and given all of the evidence adduced.

### **C–The Intervenor**

[26] The intervenor's arguments relate to the determination of whether or not an undertaking is a federal undertaking. It submits that the Board has exclusive jurisdiction to make such a

determination. It points out that legislative jurisdiction over labour relations is generally the domain of the provinces and federal jurisdiction over this area is the exception.

[27] Relying on the case law submitted to the Board, the intervenor argues that, to determine whether the employer's undertaking is federal for labour relations purposes, the Board must determine whether the interprovincial transportation operations are normal and habitual operations of the undertaking as a going concern, as opposed to operations of a casual or exceptional nature. The predominant factor is the "regular and continuous" rather than casual nature of the undertaking's extraprovincial transportation operations. According to the intervenor, it is important to consider what the undertaking actually does rather than what it has the ability to do.

[28] It espouses the argument developed in the Board's case law that the frequency of extraprovincial operations is merely a general indicator of regularity and continuity. Although the Board does not consider the number of extraprovincial trips and the distances travelled conclusive for determining the regularity and continuity of the company's transportation operations, it does take such factors into account in considering whether operations are casual in nature.

[29] The intervenor submits that what is involved here is a ruse on the part of the employer to give the impression that the company falls under federal jurisdiction. It refers to the arguments that the employer submitted to the Board on April 21, 2011, in connection with file no. 28706-C, in which it indicated the following:

- a) the interprovincial transportation operations did not meet the statutory or jurisprudential tests of regularity and continuity for the undertaking to qualify as a federal undertaking;
- b) the undertaking did not have any regular transportation routes in the province of Ontario;

c) any transportation operations within the province of Ontario were the direct result of customers' requests for such and there could be times when no such operations were carried out;

d) between 60 and 90 trips were made into Ontario per calendar year; there were no set patterns to such trips, which were completely dependent on customer demand;

e) the persons covered by the bargaining certificate held by the Association des employés EBM were not engaged in the transportation of passengers outside the borders of the province of Quebec;

f) it had decided to discontinue trips into the province of Ontario.

[30] The intervenor points out that yet now, only a few months later, the employer is saying that its undertaking meets the tests of regularity and continuity and that its interprovincial transportation operations are no longer casual or exceptional operations.

[31] The intervenor submits that it decided to pursue its certification application before Quebec's Commission des relations du travail based on the information that the employer had sent the Board on April 21, 2011, and confirms that, on May 11, 2011, the Quebec Commission granted it certification to represent a majority of the employees of the employer.

[32] The intervenor is of the view that the Board must take into account the coincidence between its provincial certification and the change in the employer's reckoning of the importance of its interprovincial transportation operations when it provided information to HRSDC and the CSST.

[33] The intervenor points out that the letter of September 13, 2011, from the HRSDC inspector refers to information obtained from the employer at a meeting on July 20, 2011. On August 31, 2011, the employer sought a reassessment of its contributions from the CSST on the basis that the company's operations for 2010 and 2011 had come under federal jurisdiction, and the CSST issued its decision in this regard on September 20, 2011.

[34] In the view of the intervenor, the opinion of an HRSDC official based on information supplied by an interested party and never submitted to judicial inquiry is self-serving rather than compelling evidence, and the same holds true in regard to the CSST's recognition of federal jurisdiction.

[35] The intervenor also submits that the employer contradicts itself in its position in connection with the instant certification application filed by the applicant on December 23, 2011, and its position in connection with file no. 28706-C. In fact, on April 21, 2011, in connection with file no. 28706-C, the employer stated the following:

... Also of note is that the persons covered by the bargaining certificate held by the Association des employés EBM are not engaged in the transportation of passengers outside the borders of the province of Quebec.

(page 3; translation)

Yet, in the instant matter, the employer indicates the following in a description of the undertaking filed on January 5, 2012:

In regard in particular to the Peter Hall unit, for which certification by the CIRB is being sought, trips into Ontario are not as frequent and are more of an exception.

(translation; emphasis in original)

[36] The intervenor states that, by virtue of the applicant's certification application to the Board, the persons covered by the application may now "be called on to transport passengers outside the province of Quebec on an exceptional basis" (translation). The intervenor even points out that none of the names of the drivers on the transportation contracts entered into evidence match the names of the employees covered by the certification application.

[37] The intervenor submits that the applicant and employer are twisting the facts to avoid coming under provincial jurisdiction, for reasons unrelated to labour relations and freedom of association.

It submits that what is involved is a ruse designed to damage its interests and impede the freedom of association of its members.

[38] In the view of the intervenor, the Board should characterize the transportation operations in Ontario as “casual,” based on a careful analysis of the evidence. Contrary to what the applicant is alleging, the employer made only 12 charter trips into Ontario in 2010, for a total of 19,344 kilometres out of the total of 574,000 kilometres driven, or 3.3% of total distance driven in 2010. In 2011, it again made only 12 trips, for a total of 26,955 kilometres driven in Ontario out of a total of 1,024,430 kilometres driven by the undertaking as a whole, or 2.6 % of the total distance driven in 2011. For 2012, the employer entered into evidence one contract for a charter trip to Ontario, on January 21, 2012, involving an estimated 404 kilometres in total.

[39] In the opinion of the intervenor, the low kilometrage driven in Ontario and the small number of contracts for charter trips into Ontario revealed in the evidence should lead the Board to characterize these operations as “casual” and to find that, as a whole, the employer’s normal and habitual operations fall under provincial jurisdiction.

#### **IV—Analysis and Decision**

##### **A—Applicable Law**

[40] There is a presumption that labour relations fall under provincial jurisdiction (see *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, 2010 SCC 45; [2010] 2 S.C.R. 696 (*NIL/TU, O*)). There are exceptions, however. Where an entity is a federal work, undertaking or business, its labour relations fall under federal jurisdiction. Undertakings engaged in interprovincial transportation are among such federal works, undertakings or businesses, defined as follows in section 2 of the *Code*:

2. In this Act,

“federal work, undertaking or business” means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province.

[41] In determining whether undertakings are federal, the Board must consider the nature of the undertaking's operations based on a functional test. As explained by the Supreme Court of Canada in *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754:

... The question whether an undertaking, service or business is a federal one depends on the nature of its operation: Pigeon J. in *Canada Labour Relations Board v. City of Yellowknife*, at p.736. But, in order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", (Martland J. in the *Bell Telephone Minimum Wage* case at p. 772), without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity; *Agence Maritime Inc. v. Canada Labour Relations Board* (the *Agence Maritime* case); the *Letter Carriers'* case.

(page 769)

[42] More recently, the Supreme Court summed up the constitutional landscape in the area of labour relations in *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53; [2009] 3 S.C.R. 407, stating the following:

[27] The basic rule in the division of powers over labour relations is that the provinces have jurisdiction over industries that fall within provincial legislative authority and the federal government has jurisdiction over those that fall within federal legislative authority: see *Labour and Employment Law: Cases, Materials, and Commentary* (7th ed. 2004), at p. 85. However, as the jurisprudence makes clear, federal jurisdiction has been interpreted narrowly in this context. In *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, the Judicial Committee of the Privy Council held that the s. 92(13) provincial head of power over "Property and Civil Rights" in the provinces includes labour relations. It is only where a work or undertaking qualifies as federal that provincial jurisdiction is ousted.

[28] In *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115, Dickson J. (as he then was) summarized the principles that govern federal-provincial jurisdiction over labour relations, at p. 132:

"(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

...

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation. [Emphasis added.]”

Under s. 92 of the *Constitution Act, 1867*, therefore, provincial jurisdiction is the norm. Federal jurisdiction extends only to those classes of subjects expressly excepted from the provincial heads of power and those enterprises deemed integral to such federal works and undertakings. As I will discuss, s. 92(10)(a), itself a limited carve-out, provides for such a federal exception. The question in this case is whether the nature of the operations of Fastfrate are subject to provincial or federal jurisdiction.

(emphasis in original)

[43] In *NIL/TU,O*, the Supreme Court reiterated the tests used in case law for determining federal jurisdiction over labour relations, stating the following:

[3] For the last 85 years, this Court has consistently endorsed and applied a distinct legal test for determining the jurisdiction of labour relations on federalism grounds. This legal framework, set out most comprehensively in *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115 and *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, and applied most recently in *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407, is used regardless of the specific head of federal power engaged in a particular case. It calls for an inquiry into the nature, habitual activities and daily operations of the entity in question to determine whether it constitutes a federal undertaking. This inquiry is known as the “functional test”. Only if this test is inconclusive as to whether a particular undertaking is “federal”, does the court go on to consider whether provincial regulation of that entity’s labour relations would impair the “core” of the federal head of power.

[44] In the transportation industry, the deciding factor in determining whether an undertaking’s labour relations fall under federal jurisdiction is the “regularity and continuity” of the interprovincial transportation operations carried out by the undertaking. The test for regularity and continuity of interprovincial transportation operations has been the subject of numerous Board decisions (see in particular *Mackie Moving Systems Corporation*, 2002 CIRB 156). In *The Gray Ligne of Victoria Ltd.* (1989), 77 di 169; and 5 CLRBR (2d) 226 (CLRBR no. 741), the Canada Labour Relations Board, the predecessor to the current Board, explained the test as follows:

The test to determine whether a transportation operation connects provinces or extends beyond the limits of a province is a factual one. The overriding consideration is whether the extra-provincial operations of the business are “regular and continuous” as opposed to being “casual.” The leading cases in this area are: *A.G. Ontario v. Winner*, [1954] A.C. 541 (Privy Council); *Regina v. Cooksville*

*Magistrate's Court, Ex parte Liquid Cargo Lines Ltd.*, [1965] 1 O.R. 84 (H.C.J.); *Regina v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd.*, [1960] O.R. 497 (H.C.J.); and *Ottawa-Carleton Regional Transit Commission v. Amalgamated Transit Union, Local 279 et al.*, (1983), 84 CLLC 14,006 (Ont. C.A.).

(page 174; and 231)

[45] All of the parties concerned in this matter agree that the applicable test for determining whether the Board has jurisdiction involves the regularity and continuity of the interprovincial transportation carried out by Autobus Idéal Inc. between Quebec and Ontario.

[46] According to the case law, the number of trips made is only one factor and should be considered merely a general indicator of the regularity and continuity of the interprovincial transportation. The Quebec Court of Appeal stated the following in this regard in *Léo Beauregard & Fils (Canada) ltée c. Commission des normes du travail*, April 4, 2000, no. 500-09-003480-969:

[26] In determining whether a transportation undertaking falls under provincial or federal jurisdiction, the percentage of extraprovincial trips is of little consequence. What matters is the regularity and continuity of the transportation operations outside the province (see, *inter alia*, *A.G. Canada c. Winner*, (1954) A.C. 541; *Re Tank Truck Transport Ltd.*, (1963) 1 O.R. 272 (C.A.); *Re Liquid Cargo Lines Ltd.*, (1965) 46 D.L.R. (2d) 700 (H.C. Ont.); *A.G.-Québec c. A. & F. Baillargeon Express inc.*, (1979) 97 D.L.R. (3d) 447 (C.A. Que.); *In re Ottawa-Carleton Regional Transit Commission*, [1983] 44 O.R. (2d) 560 (C.A. Ontario); *Transport R.M.T. c. Racicot*, Montréal S.C., no. 500-05-001085-958, May 8, 1995, Mr. Justice Jean-Jacques Croteau (J.E. 95-1437); see also Micheline Patenaude, "L'entreprise fédérale," (1990) 31 *C. de D.* 1195, 1209).

(translation)

[47] Furthermore, licences and permits are not conclusive in terms of the determination to be made other than in the sense that they are evidence regarding continuity and regularity of operations. In *Pioneer Truck Lines Ltd.*, 1999 CIRB 31, the Board stated the following:

[44] Consistent with the approach taken in the cases described above, the Board must consider what the business of Pioneer actually does, not what it had the power to do. As such, the extra-provincial licences are of no consequence, unless it is also established that such licences were used and such trips were made on a regular and continuous basis. As of the date of the hearing, there were no ongoing contracts involving out-of-province work. While this may (or may not) have been pure coincidence, it is an indication of the nature of the business operation, which is shown to be normally and habitually an intra-provincial trucking operation. The frequency of extra-provincial work is one indicator of the "pith and substance" of the business. At best, the extra-provincial activity in this case could be said to be irregular. The Board wishes to point out that it is not considering such work frequency as

conclusive, in the sense that this factor is used as a percentage of work test to decide the "regular and continuous" issue. It is viewed merely as a general indicator of regularity and continuity.

[48] Additionally, a predetermined schedule of interprovincial trips is not conclusive when applying the regularity and continuity test. The fact that the undertaking is ready and willing to provide interprovincial transportation at its customers' requests can be an indicator. It has been clearly established that the test to be applied to determine whether or not the undertaking's interprovincial operations are regular and continuous is qualitative as opposed to quantitative. The Board was clear about this in *Autocar Royal (9011-4216 Québec Inc.)*, 1999 CIRB 42, where it stated the following:

[53] It should be noted, however, that the concept of "regularity and continuity" does not mean that the extra-provincial transportation is subject to or must be carried out in accordance with a predetermined schedule. It is sufficient to find that the business operator is ready and willing to provide extra-provincial transport, if and when customers request such service. It should also be noted that the test does not involve a quantitative approach; therefore, even when the extra-provincial aspect of a business is only a small percentage of the overall operations, the operations may nevertheless come within federal jurisdiction if this small percentage meets the "regular and continuous" test (see *Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al.* (1983), 44 O.R. (2d) 560 (C.A.); *Burns Foods (Transport) Ltd.* (1990), 81 di 114 (CLRB no. 809); and *The Gray Line of Victoria Ltd.* (1989), 77 di 169; and 5 CLRB (2d) 226 (CLRB no. 741)).

[49] It must also be borne in mind that, even if the interprovincial transportation operations appear incidental in terms of number relative to the core activity of provincial transportation operations, the undertaking may still fall under federal jurisdiction if the interprovincial transportation operations are regular and continuous. This was the finding reached by the Quebec Court of Appeal in a case involving school bus and interprovincial charter transportation, *Commission de la santé et de la sécurité du travail c. Autobus Jacquart inc.*, December 14, 2000, no. 200-09-002048-988:

[54] Furthermore, and more importantly, after stating that the tests of *regularity* and *continuity* of service are key in terms of the determination to be made, the Commission shifts to the "incidental" test relative to the core activity, stating that even if extraprovincial transportation is an incidental activity, the undertaking may still fall under federal jurisdiction if such activity is regular and continuous. The relevant test would be met. Such transportation may also be seasonal in nature, may experience some peaks and valleys, and may stop altogether for certain periods of time. If the carrier remains ready to provide the service at all times, there is regularity and continuity.

[55] It is true that the service provided by Jacquart is dependent on customer demand. However, the direction taken by the company and its efforts to develop its transportation operations outside Quebec are very concrete and real. If extraprovincial charter operations, which of necessity are dependent on customer demand, can never be considered regular and continuous, then no interprovincial charter transportation service will ever fall under federal jurisdiction.

[56] Finally, it is wrong to conclude that regular and continuous service to places outside Quebec, which varies according to customer demand, in no way affects Jacquart's *raison d'être*. A company's *raison d'être* can be charter transportation. And if a company offers extraprovincial charter transportation on a regular and continuous basis, all of the company's operations will fall under federal jurisdiction.

(translation)

[50] The parties also recognize the principle of the indivisibility of the undertaking's operations, whereby if part of its operations fall under a specific jurisdiction, then all of its transportation operations fall under that jurisdiction.

## **B-Decision**

[51] A majority of the Board finds that the employer is a federal work, undertaking or business within the meaning of section 2(b) of the *Code*. A review of the Board's decisions shows that each case is unique and that the factors set out below generally apply in determining the jurisdiction under which an undertaking falls.

[52] The nature of the undertaking is not at issue here. The functional test as determined by the Supreme Court shows that the undertaking's core operation is the transportation of passengers. In *Pioneer Truck Lines Ltd.*, *supra*, the Board stated the following in this regard:

[17] Before turning to the "regular and continuous" test, the Board must first be satisfied that the operation in question is in fact a transportation operation. The employer, in this case, has argued that the core activity of Pioneer Truck is "more akin to construction than to interprovincial trucking."

[53] A majority of the Board finds that the employer's interprovincial transportation operations are normal and habitual operations of the undertaking carried on as a going concern and that the charter trips into Ontario are not merely casual or exceptional operations.

[54] A majority of the Board further finds that the employer's charter trips between Quebec and Ontario are regular and continuous in nature.

[55] The Board has a duty to decide the issue raised on the basis of the evidence filed by the parties. It is true that it was difficult to decide between the employer's position expressed on April 21, 2011, in connection with file no. 28706-C and that expressed in January and March 2012, but the Board must look at the facts alleged and proven in the instant matter. In April 2011, the employer indicated that it made between 60 and 90 charter trips to Ontario. In the instant case, the evidence shows that it actually makes about a dozen trips a year. However, the Board cannot characterize such interprovincial operations as casual or exceptional.

[56] Based on the case law cited, a majority of the Board concludes that the percentage of trips made interprovincially is of little consequence. It is but one of the factors to be weighed in determining the regularity and continuity of the interprovincial transportation operations. As the Board has already stated, the applicable test is qualitative rather than quantitative.

[57] In order to determine whether an activity is regular and continuous, the Board cannot rely solely on the fact that the employer holds the licences and permits required for interprovincial operations, that it files quarterly tax rebate returns indicating distance travelled, or that it has extended insurance coverage for such operations. However, the Board cannot ignore this evidence, which serves to confirm the regularity and continuity of the operations.

[58] According to the case law cited, the concept of "regularity and continuity" does not mean that the employer's charter trips are subject to or must be carried out in accordance with a predetermined schedule. In the instant matter, the Board has before it evidence that the employer is ready and willing to provide charter trips to Ontario at the request of customers (see *Autocar Royal, supra*).

[59] The employer's interprovincial transportation operations may seem incidental from a percentage viewpoint to the transportation operations in Quebec alone, but the undertaking can still fall under federal jurisdiction if its interprovincial operations are regular and continuous. There is evidence to this effect in the instant matter and the Board is unable to find that what is involved is a ruse on the part of the employer and applicant. In *Commission de la santé et de la sécurité du travail c. Autobus Jacquart inc., supra*, the Quebec Court of Appeal stated the following:

[54] ... Such transportation may also be seasonal in nature, may experience some peaks and valleys, and may stop altogether for certain periods of time. If the carrier remains ready to provide the service at all times, there is regularity and continuity.

(translation)

[60] Based on the evidence in the file, the Board is unable to find that the employer's charter operations in Ontario are exceptional or casual in nature. Exceptional is the opposite of continuous, and the evidence in the file does not show that the charter operations in Ontario are exceptional in this case. The employer makes charter trips whenever a customer requests such and is consistently able to meet any demand in this respect. Casual is the opposite of regular. The evidence shows that the charter trips into Ontario are not casual. As a rule, the employer has made one trip to Ontario every month of the year since 2010, and making such a trip is not an irregular operation for it.

[61] The parties have recognized that the Board has the authority to determine whether the employer's undertaking is subject to the provisions of the *Code*. They have further recognized that the decision of HRSDC of September 13, 2011, and that of the CSST of September 20, 2011, cannot thwart such authority. The Board thus considers those decisions to be no more than evidence in support of the employer's argument concerning its human resource management in the area of occupational health and safety and the resulting difficulty for its operations.

[62] On April 26, 2012, the Board took the matter under advisement and, on May 9, 2012, it issued certification order no. 10263-U to the applicant. The majority of the Board read the dissenting member's comments referring to the decision of the Board in *Schnitzer Steel BC, Inc.*, 2012 CIRB 640, dated April 24, 2012, and released on April 27, 2012, and the decision of the Supreme Court of Canada in *Tessier Ltée v. Québec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23, handed down on May 17, 2012. Since each case is unique, a majority of the Board considers that, in its decision, the Supreme Court did not call into question the principles of regularity and continuity established by it in its earlier rulings in regard to the determination of constitutional jurisdiction in the area of transportation. Nor did the Board call those principles into question in its decision in *Schnitzer Steel BC, Inc.*, *supra*. In that matter, it relied on the "functional test" to determine whether the interprovincial transportation carried out for third parties was sufficiently integrated into the undertaking's core operation and found that it was minimal when

compared with that core operation of metals recycling. The quantitative test was not given precedence over the qualitative test recognized in the Board's case law.

[63] Accordingly, a majority of the Board finds that the employer's interprovincial charters are regular and continuous operations, bringing the undertaking under federal jurisdiction and making it subject to the *Code*.

[64] This is a majority decision of the Board.

***Translation***

Claude Roy  
Vice-Chairperson

Daniel Charbonneau  
Member

### **Dissenting Opinion of Robert Monette, Member**

[65] With all due respect to my colleagues in the majority, I do not agree with their assessment and finding that the *Code* applies to the undertaking in this matter. Rather, based on the evidence in the file, I respectfully consider that the extraprovincial operations of Autobus Idéal Inc. are marginal and insufficient for the employer to fall under the authority of the *Code*.

#### **A—The Evidence**

[66] Autobus Idéal Inc. is a school bus and charter transportation company whose routes are essentially local and regional, within Quebec. Its employees are covered by two bargaining certificates, both issued by Quebec's Commission des relations du travail: one for a unit represented by the applicant, comprising some 22 drivers and 8 monitors assigned to the routes for Peter Hall School in Montréal, and the other for a unit represented by the intervenor, comprising employees working out of its facilities on Marco-Polo Avenue in Montréal, though the number of such employees cannot be ascertained from the evidence on file.

[67] On a day-to-day basis, the company's buses and the staff in the two units are engaged in local transportation to schools and charter trips to points of interest within Quebec. The only exception to such day-to-day, continuous operations occurs on average once a month, when one bus and one driver are assigned to transport a school or social group from Montréal to a cultural, recreational or tourist attraction in Ontario, primarily the National Capital Region. Such trips are same-day round trips except for very rare occasions.

[68] The evidence does not indicate the exact size of the company's fleet or the number of trips made daily or monthly. Rather, the evidence is limited to establishing that a trip was made outside Quebec's borders every month in the two years preceding the filing of the application before the Board.

[69] The said trips are organized at the request of school or social groups and the destinations, trip dates and availability of suitable buses are all dependent on the groups' requirements. Usually,

Autobus Idéal Inc. takes a group from Montréal to the nation's capital and then returns the group to Montréal at the end of the day, without taking on any new passengers in Ontario. There is no regular scheduled service and the excursions are dependent on demand and availability.

[70] The evidence includes copies of all 24 contracts for the 24 return trips between Montréal and Ontario over the past two years, at the rate of one trip per month, with rare exceptions. Each contract indicates the distance involved, which is generally 400 kilometres per trip. A 25th contract was also entered into evidence, for a similar trip made in January 2012.

[71] The evidence also reveals the total number of kilometres driven by Autobus Idéal Inc.'s full fleet over the past two years, in three-month increments, through the IFTA returns completed and used by the company to determine fuel taxes for distances driven in Ontario. The returns indicate that, generally, the fleet covers about 200,000 kilometres every three months, all operations included. Based on the contracts described above, the average three trips made by Autobus Idéal Inc. to Ontario in any given three-month period, in the 2011 calendar year, for instance, total an average of about 1,200 kilometres (three trips at a rate of 400 kilometres per trip)—and that is not even counting the fact that a large number of those kilometres are travelled in Quebec on the "to" and "from" legs of each round trip. This kilometrage driven in Ontario is about the same in each three-month increment and is a tiny fraction of total kilometrage, which according to IFTA returns was just over one million kilometres in 2011.

[72] I note from the company's IFTA returns that it reported driving between 4,000 and 7,000 kilometres in Ontario every three months, particularly in 2011, yet the evidence clearly shows that travel in Ontario by the company's fleet was limited to the trips made to the nation's capital, as described above, which actually totalled approximately 1,200 kilometres every three months. The significant discrepancy between the IFTA figures and the actual kilometrage driven in Ontario is not explained in the evidence. What is important here is that, according to the company's contracts, the company actually made about 12 trips outside Quebec in 2011, for a total of 4,600 kilometres out of the total one million kilometres driven by its fleet as a whole.

## B-Analysis

[73] In other words, according to the evidence, all of Autobus Idéal Inc.'s fleet and all of its staff are assigned exclusively to intraprovincial routes every day of every month except for one day a month on average, when one bus and one driver are assigned to a round trip from Montréal to a destination in Ontario, generally the National Capital Region.

[74] With all due respect for the contrary opinion, I am of the view that this trip, even if it occurs once a month, is too infrequent and of too little consequence when compared with the company's continuous, day-to-day operations, to give rise to the application of the *Code* to the entire undertaking, whose operations are essentially local and provincial.

[75] In my view, the burden is on the one alleging that the *Code* applies to prove the relative importance, real volume, and high frequency of extraprovincial activity, to satisfy a tribunal that an exception should be made to the standard of provincial jurisdiction over labour relations. With all due respect, in my opinion, this burden was not discharged in this matter, since the extraprovincial trips made in 2011 accounted for barely 0.46% of the undertaking's overall road transportation operations.

[76] I believe that the comments of the lord justices of the Privy Council in *Attorney-General for Ontario et al. v. Winner et al.*, [1954] 4 D.L.R. 657 (P.C.), at paragraph 54, apply to this undertaking, and that the authority of the case of *The Gray Line of Victoria Ltd.*, *supra*, is compelling in the current circumstances: in that case, 29 extraprovincial charter trips over a period of 15 months were not sufficient to satisfy the Board that Gray Line should be governed by the *Code*, given its generally wholly local day-to-day operations.

[77] Added to the foregoing precedents are two relevant decisions rendered after the deliberations in the instant matter were completed, that is, the Board's decision in *Schnitzer Steel BC, Inc.*, *supra*, in which 164 extraprovincial trips over 12 months were not sufficient to bring the essentially provincial and local operations of the scrap metal dealer under federal jurisdiction; and the recent decision of the Supreme Court of Canada in *Tessier Ltée v. Québec (Commission de la santé et de*

*la sécurité du travail*), *supra*, which emphasizes at paragraphs 50 and 51 that the company's extraprovincial operations, which represent an insignificant part of the company's overall operations, will not render the undertaking federal where the essential ongoing nature of such operations is provincial.

### **C-Conclusion**

[78] In my view, the labour relations of Autobus Idéal Inc., which according to the evidence is an essentially local, intraprovincial undertaking, fall under provincial jurisdiction, as is the constitutional norm in this area and as is shown by the provincial bargaining certificates already issued in regard to the undertaking. The facts and circumstances in the instant matter do not warrant the application of the *Code*, given that, in my opinion, the proven extraprovincial operations are far too negligible and insignificant to allow the claim that the undertaking should be governed by the *Code*. For all of the foregoing reasons, I would dismiss the application for lack of jurisdiction.

### ***Translation***

Robert Monette  
Member